

[Cite as *State v. Kopchock*, 2010-Ohio-3079.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92353

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

AARON C. KOPCHOCK

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-513814

BEFORE: Gallagher, A.J., Cooney, P.J., and Stewart, J.

RELEASED: July 1, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

SEAN C. GALLAGHER, A.J.:

{¶ 1} Defendant-appellant, Aaron Kopchock, appeals his conviction from the Cuyahoga County Court of Common Pleas. Finding no merit to this appeal, we affirm.

{¶ 2} In April 2008, Kopchock was charged with four counts of unlawful sexual conduct with a minor, in violation of R.C. 2907.04(A). A few months later, he was indicted on the same four counts of unlawful sexual conduct with a minor and one additional count of corrupting another with drugs, in violation of R.C. 2925.02(A)(4)(a) and/or (A)(3)(b). The two indictments were identical save the fifth count in the second indictment.

{¶ 3} Kopchock waived a jury and was tried to the bench. The state proceeded on the five-count indictment. The original indictment was dismissed after trial.

{¶ 4} At trial, the victim testified that her birthday was March 10, 1994. She stated that before she met Kopchock at a party in February 2008, she had spoken to him on the phone while she was with her friend Ron Mucci, who was also a friend of Kopchock. Mucci took the victim to the party and told her to tell people that she was 18 years old. The victim was 13 years old at the time of the party. At some point, the victim told Kopchock that she was 18 years old.

{¶ 5} After the party, the victim contacted Kopchock via text messaging. They communicated by text messaging for a few weeks. The victim told Kopchock that she was 16 years old and went to Midpark High School. Kopchock called her “jailbait.”

{¶ 6} The two met again in person at the end of February. Kopchock picked up the victim at her grandparents’ house and drove her back to his father’s house. They watched movies and had sexual intercourse. Kopchock drove her home.

{¶ 7} Kopchock invited her to his dormitory room at John Carroll University around the time of her birthday. The victim was hesitant to go because she did not want her father to find out and because she was afraid Kopchock might be “catching on” to her real age.

{¶ 8} Kopchock picked up the victim and drove her to John Carroll University. The two drank alcohol in his dormitory room. They then went outside with a friend and smoked marijuana. When Kopchock and the victim returned to his dormitory room, they engaged in oral sex and vaginal intercourse. They fell asleep. The next morning they again had oral sex and vaginal intercourse. Kopchock showered and drove the victim home.

{¶ 9} While the victim was getting her hair cut, her father searched her cell phone and read her text messages from Kopchock, which talked about drinking. The victim’s father confronted her and called Kopchock, informing

him that the victim was only 14 years old. Her father went to the police. The victim was taken to the hospital.

{¶ 10} The victim testified that she and Kopchock sometimes communicated by way of their “MySpace” pages. She testified that on her MySpace page she originally listed her age as 16, but she changed it to 14 during the time she was communicating with Kopchock. She also stated that she posted on her MySpace page that she was a student at Ford Middle School.

{¶ 11} The victim testified that the sexual conduct was consensual.

{¶ 12} Ron Mucci testified for the defense. He testified that he told Kopchock that the victim was 15 or 16 years old because that is what she told him. He testified that he took the victim to the party. He admitted that the victim’s MySpace page indicated she was 14 years old.

{¶ 13} Two girls testified for the defense. Both testified that they were at the party the victim attended, and that she appeared to be 18 years old.

{¶ 14} Kopchock testified that he was a senior at John Carroll University. He testified that he met the victim at a party and that Mucci told him that she was 16 years old.

{¶ 15} Kopchock testified that the victim started text messaging him. He testified that he did pick her up at her grandmother’s house and had sexual intercourse with the victim at his father’s house. He also admitted

having sexual intercourse with her at his dormitory and drinking and smoking marijuana with the victim.

{¶ 16} Kopchock admitted that he never asked the victim how old she was. He never asked her which birthday she was celebrating. He knew that her mother had recently died and that there was a custody battle between the victim's father and grandmother. Kopchock testified that he was "utterly speechless" when the victim's father called and told him that the victim was 14 years old.

{¶ 17} The trial court found Kopchock not guilty of Count 1, but guilty on the remaining counts. He was sentenced to three years of community control sanctions and labeled a Tier II offender.

{¶ 18} Kopchock appeals, advancing three assignments of error for our review. His first assignment of error states the following:

{¶ 19} "The trial court committed reversible error by denying appellant's motions to vacate guilty findings and enter judgments of acquittal on counts two, three, and four of the indictment."

{¶ 20} Kopchock was indicted on four counts of unlawful sexual conduct with a minor. He was then reindicted with the same four counts, as well as one count of corrupting a minor with drugs. The state pursued the second indictment, dismissing the first indictment after trial. Kopchock argues that double jeopardy and res judicata mandate reversal of his conviction.

{¶ 21} The Double Jeopardy Clause “protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.” *Brown v. Ohio* (1977), 432 U.S. 161, 165, quoting *North Carolina v. Pearce* (1969), 395 U.S. 711, 717 (footnotes omitted).

{¶ 22} R.C. 2941.32 states: “If two or more indictments or informations are pending against the same defendant for the same criminal act, the prosecuting attorney must elect upon which he will proceed, and upon trial being had upon one of them, the remaining indictments or information shall be quashed.”

{¶ 23} We fail to see how Kopchock was placed in jeopardy twice merely because the state dismissed the first indictment after trial instead of before trial. Therefore, we overrule Kopchock’s first assignment of error.

{¶ 24} Kopchock’s second assignment of error states the following:

{¶ 25} “The trial court committed reversible error by refusing to admit Defendant’s Exhibits C and C-1 into evidence.”

{¶ 26} Kopchock argues that defense exhibits C and C-1, the victim’s MySpace pages, were admissible to prove that he was not reckless regarding the victim’s age. He contends that the victim’s MySpace page did not state

her true age or that she attended middle school, as the victim claimed. The court found the evidence inadmissible, citing Evid.R. 616(C).

{¶ 27} The applicable standard of review for questions regarding the admission or exclusion of evidence is abuse of discretion. *State v. Russell*, Cuyahoga App. No. 83699, 2005-Ohio-2998. Pursuant to Evid.R. 401, “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence.” “Under Evid.R. 402, all relevant evidence is admissible, subject to enumerated exceptions.” *State v. Rudge* (Dec. 20, 1996), Portage App. No. 95-P-0055.

{¶ 28} Kopchock was charged under R.C. 2907.04(A), which states the following: “No person who is eighteen years of age or older shall engage in sexual conduct with another, who is not the spouse of the offender, when the offender knows the other person is thirteen years of age or older but less than sixteen years of age, or the offender is reckless in that regard.”

{¶ 29} R.C. 2901.22(C) defines “reckless” as follows:

{¶ 30} “A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the

consequences, he perversely disregards a known risk that such circumstances are likely to exist.”

{¶ 31} Evid.R. 616(C) allows extrinsic evidence to impeach a witness only under limited circumstances. Kopchock claims that he was not trying to impeach the victim’s testimony. Kopchock argues that he was trying to prove that he thought the victim was 16 years old and was not reckless regarding the victim’s actual age.

{¶ 32} We find that the trial court did not abuse its discretion when it excluded the MySpace pages, because the MySpace pages did not support Kopchock’s contention that he thought the victim was 16 years old or that he was not reckless regarding her age. Although there was evidence offered indicating that the victim frequently changed the age depicted on her MySpace page, exhibits C and C-1 do not contain a specific age qualifying them as direct or substantive evidence of the victim’s age. Further, we note that despite the trial court’s refusal to admit these documents under Evid.R. 616(C), Kopchock was able to testify as to what he observed on the victim’s MySpace page and to what he was told by one of his friends regarding the victim’s age. Finally, the MySpace page tended to impeach the victim’s testimony that her MySpace page indicated that she was 14 years old and attended Ford Middle School. Under these circumstances, extrinsic evidence

is inadmissible. Accordingly, Kopchock's second assignment of error is overruled.

{¶ 33} His third assignment of error states the following:

{¶ 34} "The application of R.C. Chapter 2950 to appellant violates the prohibition against cruel and unusual punishment, double jeopardy and the substantive and procedural due process rights of appellant guaranteed under the United States Constitution."

{¶ 35} This court has consistently found that registration, verification, and notification provisions of Senate Bill 10, which is Ohio's version the Adam Walsh Act, are civil in nature, and not punitive, and thus do not constitute cruel and unusual punishment. See *State v. Bias*, Cuyahoga App. No. 93053, 2010-Ohio-1977, ¶ 7; *State v. Acoff*, Cuyahoga App. No. 92342, 2009-Ohio-6633, ¶ 24. We have further held that "the prospective application of the AWA does not violate due process, double jeopardy, or constitute cruel and unusual punishment." *Acoff*, supra. Consequently, we overrule Kopchock's third assignment of error.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's

conviction having been affirmed, any bail pending appeal is terminated.

Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

COLLEEN CONWAY COONEY, P.J., and
MELODY J. STEWART, J., CONCUR